The Margin of Appreciation, Subsidiarity, and Global Challenges to Democracy

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Abstract

Much of the academic debate concerning the function of the Margin of Appreciation (MoA) doctrine is based on the assumption that democracy works more or less well and therefore any impugned domestic policy merits respect. The role of the European Court of Human Rights (ECtHR) should therefore be secondary, confined to the rare situations when the democratic process fails and the national courts refrain from rescuing it. This debate assumes that the causes of democratic failures are internal, or that domestic decision-making processes are sufficiently resilient to outside pressure. This is obviously wrong, and more so today than in any other time in the history of the modern state. The aim of this essay is to explore these external challenges to democracy and their implications to the role of the ECtHR in protecting human rights. These responses demonstrate the limits of the MoA doctrine and highlight its alternative, subsidiarity, as a superior doctrine to manage the interface between the domestic and the European components of the European human rights regime.

1. Introduction: The Margin of Appreciation doctrine and the internal failures of the political process

The Margin of Appreciation (MoA) debate has tended to focus on the question of who should promote human rights standards: the European Court of Human Rights (ECtHR) or the member states. Much of the academic debate about the function of the MoA is grounded in the assumption that democracy works more or less well. Hence, any impugned domestic policy can be assumed to have benefited from meaningful democratic deliberations at the national level or at least from effective judicial scrutiny by the independent national courts.[1] These would then be two

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[1] Andreas von Staden, *Democratic Legitimacy of Judicial Review beyond the State: Normative Subsidiarity and Judicial Standards of Review* 24, 25, Jean Monnet Working Paper 10/11. (2011). Available at SSRN: http://ssrn.com/abstract=1969442: "the margin of appreciation …is a main example of… a democratically informed standard of review."; ANDREW LEGG, THE MARGIN OF APPRECIATION IN INTERNATIONAL HUMAN RIGHTS LAW: DEFERENCE AND PROPORTIONALITY, 38 (2012): ("The strength of reasons for a margin of appreciation on the basis of external factors depends on one's view of the role of the Tribunals. If one regards the Tribunals as having the primary role of establishing human rights standards, then it is plausible that there ought to be very little scope for a margin of

institutional justifications (individually and jointly) for deference and respect by an external actor such as the ECtHR. Viewed differently, the MoA doctrine serves as an inducement for states and national courts to ensure domestic democratic processes and effective judicial review and thereby enhance protection of rights and reduce the workload of the court.

But this assumption is highly optimistic and does not adequately meet political reality. There are two flaws to that approach. The first is that the democratic processes within the state are not always capable of promoting adequate human rights standards. The second flaw is that national courts are not always capable of correcting whatever failures exist in their respective democratic systems. Unfortunately, the inherent flaws in the domestic democratic processes might disenfranchise certain groups of voters lacking adequate judicial protection at the state level. The typical candidates for such treatment are often the "discreet and insular minorities" – ethnic, cultural, religious, racial, and national. However, this is not always the case. Several minorities engage effectively in national politics and turn out to be highly influential, far outweighing diffuse majorities. The theory on collective action suggests that diffuse majorities tend to be less effective than organized special interests.[2] And this is then another consideration for the court to take into account when deciding on the proper MoA in specific cases. And while courts are inclined to protect minorities or resolve collective action problems for diffuse majorities, they often fail to do so. These concerns therefore suggest that the ECtHR intervene when the democratic processes fail and the national courts refrain from rescuing them. This was my suggestion in 1999.[3] Indeed, the ECtHR has recognized the need to protect minorities in its jurisprudence, even in highly sensitive politically scenarios.[4]

Thus far, however, the debate about the MoA and its remedial function centered on the assumption that the causes of democratic failures were internal, namely that the decision-making processes are insulated from the outside. This is obviously wrong, and more so today than any other time in the history of the modern state. The aim of this essay is to explore the *external* challenges to democracy

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appreciation to states. However, if states are important participants in the interpretation of international human rights standards and their application within their jurisdiction, then there may be reasons to give the state a margin of appreciation." Hence the limited margin for measures that suppress political freedoms: Dean.Spielmann, *Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine—Waiver or Subsidiarity of European Review.* Center for European Legal Studies Working Paper, Cambridge (2012).

[2] Mancur Olson, The Theory of Collective Action (1965). *See also* EYAL BENVENISTI & GEORGE W. DOWNS, BETWEEN FRAGMENTATION AND DEMOCRACY: THE ROLE OF NATIONAL AND INTERNATIONAL COURTS (2017), Chapter 3.

[3] Eyal Benvenisti, *Margin of Appreciation, Consensus and Universal Standards*, 31 N.Y.U J. INT'L L & POL. 843, 848 (1999). *See also* Eyal Benvenisti, *National Courts and the International Law on Minority Rights*, 2 AUSTRIAN REV. INT'L & EUR. L. 1 (1997). For a more recent reiteration of this point, see Robert O. Keohane, Stephen Macedo & Andrew Moravcsik, *Democracy-Enhancing Multilateralism*, 63 INT'L ORG. 1, 16 (2009).

[4] Sejdić & Finci v. Bosnia & Herzegovina, App. Nos. 27996/06, 34836/06, 2009 Eur. Ct. H.R. For critique, see Christopher McCrudden & Brendan O'Leary, *Courts and Consociations, or How Human Rights Courts May De-stabilize Power-sharing Settlements*, 24 EUR J. INT'L L. 477 (2013). *See also* Dominic Mcgoldrick, *A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee*, 65 ICLQ 21, 24-25 (2016).

and outline the potential responses that exist in the arsenal of the ECtHR and that can be further developed.

2. MoA and the external failures of the political process

Thus far, the debate about the resilience of the domestic democratic and judicial processes focused solely on the domestic sphere. This was myopic. Faced with challenges from external actors, it is unclear whether democratic deliberations at the national level can provide an equal voice to all citizens, and whether national courts can ensure protection against systemic failures. There is a misalignment between those who vote (in one country) and those who are affected by the vote (in another country). The voters' choices are also bound by outside pressure wielded by international organizations and private actors such as MNCs. There are also the outsiders: refugees, asylum seekers, etc. What role does the ECtHR play in responding to such challenges? What role can the MoA doctrine play?

To be able to outline the potential role of the ECtHR and the MoA doctrine in this regard, I will briefly describe the external failures of contemporary democracy. Domestic democratic processes face at least four types of challenges. These involve the relations of the voters with: (a) The outsiders within; (b) the outsiders without, (c) foreign public governance actors, and (d) foreign private actors. In this part I analyze these challenges and at the same time outline the legal responses that the ECtHR has offered or might be willing to offer in response. I make no effort to offer a full description of the ECtHR's jurisprudence on the issues covered, but instead I wish to illustrate this court's often inconsistent or inconclusive use of the MoA doctrine.

(a) The outsiders within

The "outsiders within" are the well-recognized group of non-nationals who are either seeking to enter, are already within the country, or those whom the authorities seek to deport. These include refugees, asylum seekers, undocumented family-members of citizens or lawful residents, or other non-citizens. Their concerns encompass not only the right to enter or reside but also entitlement to various socio-economic rights, some of them quite basic like access to education, healthcare or social security schemes.

Non-nationals raise two types of challenges to democracy. The first is a traditional human rights challenge. The voiceless individuals who seek entry, who fear deportation, who need access to public resources, depend on others' political choices. These are the immediate cases we encounter in the jurisprudence. And they can be regarded as an extension of the "discrete and insular" minority difficulty.

It is apparent that the ECtHR is aware of the vulnerability of non-nationals seeking entry to member states or rights within these states. As early as 1986, the ECtHR recognized in principle (and in an *obiter dictum*) the vulnerable status of non-nationals that merits enhanced judicial protection:

> "Especially as regards a taking of property effected in the context of a social reform, there may well be good grounds for drawing a distinction between nationals and non-nationals as far as compensation is concerned. To begin with, **non-nationals are more vulnerable to domestic legislation**: unlike nationals, they will generally have played no part in the election or designation of its authors nor have been consulted on its adoption. Secondly, although a taking of property must always be effected in the public interest, different considerations may apply to nationals and non-nationals and **there may well be legitimate reason for requiring nationals to bear a greater burden in the public interest than non-nationals**."[5]

The ECtHR exercises strict scrutiny, with no MoA, in cases of migrants seeking entry in dire situations such as in the case of *Hirsi Jamaa v. Italy*,[6] or those whose deportation to other countries could expose them to torture like in the case of *Chahal v. The United Kingdom*.[7] Notably, the court did not invoke the MoA doctrine when finding for the applicants in most – but not all – of these cases.[8]

In *M.S.S. v. Belgium and Greece*, concerning the expulsion by Belgian authorities of asylum seekers to Greece, the ECtHR found violations of the Convention.[9] The Court "attache[d] considerable importance to the applicant's status as an asylum-seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection. It note[d] the existence of a broad consensus at the international and European level concerning this need for special protection, as evidenced by the Geneva Convention, the remit and the activities of the UNHCR and the standards set out in the Reception Directive."[10] Note that the court compared the asylum seekers to the Roma minority (referring "mutatis mutandis" to *Oršuš and Others v. Croatia* [11]). The court did not resort to the MoA doctrine, and also in light of the specific

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[5] James & others v. United Kingdom, App. No. 8793/79, § 63, 1986 Eur. Ct. H.R., http://hudoc.echr.coe.int/eng?i=001-57507 (my emphasis).
[6] Hirsi Jamaa & Others v. Italy, App. No. 27765/09, 2012 Eur. Ct. H.R.
[7] Chahal v. United Kingdom, App. No. 22414/93, 1996, Eur. Ct. H.R.
[8] In Boultif v. Switzerland, App. No. 54273/00, § 39, 2001 Eur. Ct. H.R., the court criticized the separation of the applicant who had a criminal record from his wife as a violation of Article 8 of the Convention: "The Court recalls that the Convention does not guarantee the right of an alien to enter or to reside in a particular country. However, the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life." The court determined that the interference was not proportionate to the aim pursued, without invoking the MoA. In Tuquabo-Tekle v. The Netherlands, App. no. 60665/00, 2005 Eur. Ct. H.R., the court mentions the MoA but endorses the migrants' claims.
[9] M.S.S. v. Belgium & Greece, App. No. 30696/09, 2011 Eur. Ct. H.R.
[10] *Id*, at § 251.
[11] Oršuš & others v. Croatia (GC), App. No. 15766/03, 52 Eur. H.R. Rep. 7 (2010).

violation, reiterated that "expulsion to another country [that] will expose an individual to treatment prohibited by Article 3 of the Convention requires close and rigorous scrutiny."[12]

When dealing with socio-economic rights with respect to which states are usually entitled to a wide MoA, the court nevertheless interfered when it found discrimination against non-nationals, and held that discrimination against non-nationals must be based on "very weighty reasons."[13] Most recently, the ECtHR included HIV positive individuals who were seeking residence permits in the context of family unification among the "particularly vulnerable group[s] in society that ha[ve] suffered significant discrimination in the past," and therefore requiring that "the State's margin of appreciation [be] substantially narrower and it must have very weighty reasons for imposing the restrictions in question."[14]

In *Ponomaryovi v. Bulgaria*, Russian nationals without permanent residence permits alleged that they had been discriminated against since, unlike Bulgarian nationals and certain categories of aliens, they had been required to pay fees in order to pursue their secondary education. [15] The court asserted that while "[t]he States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment," and in particular, "the States are usually allowed a wide margin of appreciation when it comes to general measures of economic or social strategy," "very weighty reasons would have to be put forward

[12] In M.S.S. v. Belgium & Greece, the court does acknowledge that subject to "a certain margin of appreciation [that is] left to the States, conformity with Article 13 requires that the competent body must be able to examine the substance of the complaint and afford proper reparation."

[13] Gaygusuz v. Austria, App. No. 17371/90, § 42, 1996 Eur. Ct. H.R; *See* LIENEKE SLINGENBERG, THE RECEPTION OF ASYLUM SEEKERS UNDER INTERNATIONAL LAW, 195-212 (2014).

[14] Novruk & Others v. Russia, App. Nos. 31039/11, 48511/11, 76810/12, 14618/13 & 13817/14, § 100, 2016 Eur. Ct. H.R.: "If a restriction on fundamental rights applies to a particularly vulnerable group in society that has suffered significant discrimination in the past, then the State's margin of appreciation is substantially narrower and it must have very weighty reasons for imposing the restrictions in question. The reason for this approach, which questions certain classifications per se, is that such groups were historically subject to prejudice, with lasting consequences resulting in their social exclusion. Such prejudice could entail legislative stereotyping which prohibits the individualised evaluation of their capacities and needs … The Court has found that people living with HIV have to face a whole host of problems, not only medical but also professional, social, personal and psychological, and to confront deeply rooted prejudice even from among highly educated people …. The prejudice was born out of ignorance about the routes of transmission of HIV/Aids, and has stigmatised and marginalised those who live with the virus. Consequently, the Court has held that people living with HIV are a vulnerable group and that the State should be afforded only a narrow margin of appreciation in choosing measures that single out this group for differential treatment on account of their health status."

[15] Ponomaryovi v. Bulgaria, App. No. 5335/05, 2011 Eur. Ct. H.R. *See also* Gaygusuz, *supra* note 13, at § 45: A retired Turkish national denied unemployment insurance under the law because of his lack of Austrian nationality. No reference was made to MoA: "The Austrian Government submitted that the statutory provision in question was not discriminatory. They argued that the difference in treatment was based on the idea that the State has special responsibility for its own nationals and must take care of them and provide for their essential needs. Moreover, sections 33 and 34 of the Unemployment Insurance Act laid down certain exceptions to the nationality condition. Lastly, at the material time, Austria was not bound by any contractual obligation to grant emergency assistance to Turkish nationals."; Gaygusuz, *supra* note 13, at § 50: "the difference in treatment between Austrians and non-Austrians as regards entitlement to emergency assistance, of which Mr Gaygusuz was a victim, is not based on any "objective and reasonable justification"; Marie-Bénédicte Dembour, *Gaygusuz Revisited: The Limits of the European Court of Human Rights' Equality Agenda*, 12 HUM. RTS. L. REV. 689 (2012).

before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention."[16]

In the case of *Luczak v. Poland*, a French national of Polish origin, who moved to Poland requested to be admitted to the farmers' social security scheme, but was denied admission on the grounds that he was not a Polish national.[17] The court found "that the Government have [sic] not adduced any reasonable and objective justification for the distinction such as to meet the requirements of Article 14 of the Convention, even having regard to their margin of appreciation in the area of social security."[18]

A different approach was suggested in *Bah v. the UK*.[19] With respect to a petition of an asylum seeker from Sierra Leone who sought permission to stay with her son in social housing that was in short supply, the court reiterated its position concerning nationality as a ground for exclusion, it added "[b]ecause of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation."[20] The court also distinguished between nationality and immigration status as suspected grounds for distinction.[21]

The general observation from these and other cases is that the ECtHR adequately refrains from relying on the MoA doctrine or limits its scope with respect to non-nationals. The reliance on the domestic democratic process seems indeed improper in such instances.

The question is whether the same scrutiny should be exercised in other instances concerning non-nationals who are affected by state policies, a question to which I turn now.

(b) The outsiders without

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[16] Ponomaryovi v. Bulgaria, *supra* note 15, at § 52.
[17] Luczak v. Poland, App. No. 77782/01, 2007 Eur. Ct. H.R.
[18] *Id*, at § 59.
[19] Bah v. United Kingdom, App. No. 56328/07, 2011 Eur. Ct. H.R.: "Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation" (see Stec & Others v. the United Kingdom [GC], nos. 65731/01 and 65900/01, § 52, ECHR 2006-VI)."
[20] Bah v. United Kingdom, at § 37.
[21] *Id*, at § 47: "The Court notes that the nature of the status upon which differential treatment is based weighs heavily in determining the scope of the margin of appreciation to be accorded to Contracting States. … immigration status is not an inherent or immutable personal characteristic such as sex or race, but is subject to an element of choice. … Given the element of choice involved in immigration status, therefore, while differential treatment based on this ground must still be objectively and reasonably justifiable, the justification required will not be as weighty as in the case of a distinction based, for example, on nationality. Furthermore, given that the subject matter of this case – the provision of housing to those in need – is predominantly socio-economic in nature, the margin of appreciation accorded to the Government will be relatively wide."

Current global interdependencies are responsible for the lack of alignment between the group that has the right to vote and the group affected by the decisions made by, or on behalf of, the first group. The basic assumption of state democracy—that these two types of stakeholders overlap—was perhaps correct in the world of separate mansions, when territorial boundaries defined not only the persons entitled to vote but also the community affected by those choices. Because of that relative alignment, exclusive state sovereignty was both efficient and democratically just.[22] Today, the policies of one government – on matters such as land development and environmental protection, affect foreign stakeholders on a regular basis; however, without the latter having the right to vote for that government or otherwise being able to influence its decisions. The domestic political process becomes irrelevant as a way to secure wider community goals. This outcome requires polities to take into account the interests of outsiders when making decisions affecting them.[23] An illustrative case of such an "other-regarding" perspective is the *Council of the European Union v. Front Polisario*,[24] where the Court of Justice of the European Union limited the spatial scope of the trade agreement between the EU and Morocco so as not to impact the inhabitants of the region of Western Sahara that is occupied by Morocco.

Voters in one state indirectly shape the democratic processes in other countries also by defining the permeability of their own borders. By determining the right (and the opportunities) of outsiders (and outsiders' capital) to enter, they indirectly shape the nature of politics and the relative political power of voters in another country. Therefore, following Albert Hirschman's insight,[25] the entry and exit rights that the ECHR ensures indirectly shape people's life opportunities not only in the member states but also in other countries. Since democracy thrives on the collective action of its many members, and in fact is constantly defined by that activity,[26] it is possible that excessive exiting would harm the community due to under-investment by those who have alternatives.[27] We can conclude that for a democracy to flourish within states, there must be an optimal level of exit options, not too few, not too many, which available on an equal basis among voters. For the same reason, there must be an optimal level of entry options, not overly restrictive, not completely

[22] This is a matter of degree of course, cross-border influence always existed.
[23] Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT'L L. 295 (2013).
[24] Case C‑ 104/16 P, 21 December, 2016.
[25] ALBERT HIRSCHMAN, EXIT VOICE AND LOYALTY (1970).
[26] *See also* JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT (Henry Regnery Co., 1962) (1861) 83.: "[I]t is from political discussion and collective political action that one whose daily occupations concentrate his interests in a small circle round himself, learns to feel for and with his fellow-citizens, and becomes consciously a member of a great community."
[27] As Mill observed (*id*.), democracy is the way the community forms itself. We sometimes notice this aspect when talking about "brain drain". *See* Ayelet Shachar, *The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes*, 81 N.Y.U. L. REV. 148 (2006); Ayelet Shachar, *Picking Winners: Olympic Citizenship and Global Race for Talent*, 120 YALE L.J. 2098 (2011).

closed, which must be non-discriminatory. Without opportunities for entry, the right to exit is meaningless, [28] and vice versa.

By necessity, the ECHR regulates at least partly the interface of exit and entry to and from member states and also to and from Europe. It ensures the rights of exit and entry at least for some types of individuals. Although in general, international law recognizes states' wide discretion to allow entry, that discretion is subject to the recognition of the right of exit and the right of entry as individual human rights. This in itself is significant for the individuals' voice also in their countries of origin. To the extent that individuals can rely on their combined exit and entry rights, their voice is secured as compared to a situation where the ruling regime knows that their options to leave the country are limited. The availability of these rights shapes the voice that right-holders have (or do not have) in their respective countries.

The ways by which one European member state affects individuals and democratic processes within other European member states, or individuals in non-member states, of course raises questions related to the spatial scope of the Convention. According to Article 1, the Convention requires states to secure Convention rights "to everyone within their jurisdiction."[29] While an exploration of this concept is beyond the scope of this essay, I should point out one relevant aspect. In light of the misalignment that potentially affects foreign stakeholders, to the extent that they access domestic decision-making venues to voice their concerns, they come "within the jurisdiction" of the state, and their rights to a proper hearing, to transparent decision-making etc. must be respected. Arguably, the decision to allow them to come "within the jurisdiction" either in person or by proxy to voice their concern should also be respected. As strangers to the local processes, resorting to the MoA cannot be grounded by the deference-to-democracy argument.

(c) The insiders and global governance bodies

In recent years, state authorities have been delegating or surrendering regulatory discretion to a fragmented tapestry of various forms of public and private, formal and informal, international and private entities.[30] The pressure to privatize has further minimized the space for political deliberation,[31] and all too often the transition to such global regulatory entities has to varying degrees eroded the functionality of public participation in politics, traditional constitutional checks and balances found in many democracies, as well as other domestic oversight and monitoring

[28] Jeremy Waldron, *Exclusion: Property Analogies in the Immigration Debate*, 18 THEORETICAL INQUIRIES IN LAW 269 (1027).
[29] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 November 1950, art. 1.
[30] EYAL BENVENISTI, THE LAW OF GLOBAL GOVERNANCE (2014), Chapter 2.
[31] Doreen Lustig & Eyal Benvenisti, *The Multinational Corporation as "the Good Despot": The Democratic Costs of Privatization in Global Settings*, 15 THEORETICAL INQUIRIES L. 125 (2014).

mechanisms of executive discretion.[32] With global regulation becoming ubiquitous, heavily influenced by special domestic interest groups that thrive on asymmetric information, the question of voice in global entities arises. Furthermore, the voice of diffuse voters in domestic bodies diminishes. This is due to the fact that the states' ability to resist the foreign actor is effectively lost because a discrete group of states finds it impossible to unite against a common external rival – a powerful foreign state or an even mightier and more ruthless MNC – that practices "divide and rule" strategies against them, while imposing its demands on them.

The ECtHR can be the forum that unites the member states against the foreign power. Facing such challenges, the MoA doctrine should be narrow rather than wide, not only for protecting rights, but for democracy's sake. The ECtHR, like other international tribunals, can help resolve the collective action problems of states that are unable to overcome the "sovereignty trap," and rebuff the demands made by a powerful state or a multinational company that seeks to force the weaker state to comply with their demands.[33] The ECtHR has been quite successful in this context, in offering resistance to international organizations that sought immunity from national labor laws by insisting on the availability of "reasonable alternative means to protect effectively their rights."[34] The European Court of Justice (ECJ) was able to insist that global sporting associations comply with European legal standards that protect the rights of athletes,[35] and, of course, to resist the mighty UN Security Council in *Kadi*.[36]

The ECtHR has been relatively more timid in this respect. The court was willing to impose duties indirectly on international organizations that acted as employers in the member states. In the celebrated *Waite and Kennedy* judgment,[37] the court emphasized the state's duty to ensure that its citizens' rights were respected by employers who were international organizations:

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[32] Richard B. Stewart, *Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness*, 108 AM. J. INT'L L. 211 (2014) (discussing strategies to address the evolving gaps in the efficacy of domestic political and legal mechanisms of participation and accountability resulting from shifts of regulatory authority from domestic to global regulatory bodies). *See also* Benvenisti & Downs, *supra* note 2 (arguing that by employing international organizations as venues for policymaking, state executives and interest groups manage to reduce the impact of domestic checks and balances); There may be additional reasons for the concentration of power in the executive and the decline of domestic checks. *See* BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC (2010) (discussing what he sees are the (domestic) factors that lead to the rise of an unchecked U.S. presidency).

[33] Eyal Benvenisti & George W. Downs, *The Premises, Assumptions, and Implications of Van Gend en Loos: Viewed From the Perspectives of Democracy and Legitimacy of International Institutions*, 25 EUR. J. INT'L L. 85, 96 (2014).

[34] Waite & Kennedy, App. No. 26083/94, 1999 Eur. Ct. H.R.

[35] Case C-519/04, Meca-Medina v. Comm'n, 2006 E.C.R. I-6991; Case C-415/93, URBSFA v. Bosman, 1995 E.C.R. I-4921. In these cases, the ECJ was able to resolve the collective action problem created when private sports associations imposed their standards on individual states.

[36] Case C–402/05 P and C–415/05, P. Kadi and Al Barakaat International Foundation v. Council and Commission, 2008 E.C.R I–6351.

[37] Waite & Kennedy, *supra* note 34, at § 67.

> "The Court is of the opinion that where States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution. It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective. This is particularly true for the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial […]"

The court rejected the application on the grounds that their employer had provided "reasonable alternative means to protect effectively their rights under the Convention."[38] The court recognized the German labor courts' MoA in balancing the "proper functioning of international organisations" against the rights of their employees. Note that this is the MoA that the domestic courts have, rather than the European court's. Nevertheless, it is unclear whether such deference is called for, given the pressure on the domestic courts to remain "IO friendly" to promote the domestic economy.

But in the case of *Nada*, involving the UNSC's "smart sanctions," the court failed to offer a similar steadfast position, and put the MoA doctrine center stage:

> "In any event, the final evaluation of whether the interference is necessary remains subject to review by the Court for conformity with the requirements of the Convention […] A margin of appreciation must be left to the competent national authorities in this connection. The breadth of this margin varies and depends on a number of factors including the nature of the Convention right in issue, its importance for the individual, the nature of the interference and the object pursued by the interference."[39]

In *Al Dulimi*, no doubt inspired by *Kadi*, the MoA is already attenuated. Although the MoA was mentioned rather abstractly ("the Contracting States enjoy a certain margin of appreciation" with

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[38] *Id.* at § 73.

[39] Nada v. Switzerland, App. No. 10593/08, § 184, 2012 Eur. Ct. H.R.; *See also* §185: "In order to address the question whether the measures taken against the applicant were proportionate to the legitimate aim that they were supposed to pursue, and whether the reasons given by the national authorities were "relevant and sufficient", the Court must examine whether the Swiss authorities took sufficient account of the particular nature of his case and whether they adopted, in the context of their margin of appreciation, the measures that were called for in order to adapt the sanctions regime to the applicant's individual situation." (Ironically, the Swiss court found that Switzerland had no MoA to implement UNSC resolutions).

respect to limitations on the right of access to a court),[40] the court found a violation without mentioning the doctrine.[41]

(d) The insiders and foreign private actors

There are two types of foreign private actors: actual and virtual. By virtual I mean local actors that reinvent themselves as foreign by creating foreign-based companies. As a result, foreign or locally-based multinational corporations evade political boundaries with their regulatory regimes and tax obligations. With these "freedoms" of movement and incorporation, by increasing the real or virtual exit options of owners (and of their capital or income thereof) they also increase the owners' voice in all relevant jurisdictions, lower their incentives to contribute to the welfare of the community, while at the same time diminishing the voice of those whose exit options are more limited as well as their means of promoting community goals.

Moreover, as mentioned earlier, actual and virtual private actors can also extort host or potentially host states. The response can be two-pronged: limiting privatization; and expanding duties of private actors that function as public ones, including employers etc. The *Waite and Kennedy* rationale applies here as well, and other arguments in that vein have been pursued.[42] And, to the extent that states intervene and impose, the MoA should be narrow, not wide.

The ECtHR has made some steps in this direction, mainly by imposing human rights duties on private employers, but it invariably invoked the MoA doctrine in this context.[43] The fact that the

[40] Al-Dulimi & Montana Management Inc. v. Switzerland, App. No. 5809/08, §124, 2016 Eur. Ct. H.R.

[41] *See also* Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland, App. No. 45036/98), § 149, 2005 Eur. Ct. H.R. (measures adopted by the EU): "Since the second paragraph of Article 1 of Protocol No. 1 is to be construed in the light of the general principle enunciated in the opening sentence of that Article, there must exist a reasonable relationship of proportionality between the means employed and the aim sought to be realised: the Court must determine whether a fair balance has been struck between the demands of the general interest in this respect and the interest of the individual company concerned. In so determining, the Court recognises that the State enjoys a wide margin of appreciation with regard to the means to be employed and to the question of whether the consequences are justified in the general interest for the purpose of achieving the objective pursued…"

[42] *See* BENVENISTI, *supra* note 30, at 145-50.

[43] Young, James & Webster v. The United Kingdom, App. Nos. 7601/76; 7806/77, § 65, 1981 Eur. Ct. H.R.: "Having regard to all the circumstances of the case, the detriment suffered by Mr. Young, Mr. James and Mr. Webster went further than was required to achieve a proper balance between the conflicting interests of those involved and cannot be regarded as proportionate to the aims being pursued. Even making due allowance for a State's "margin of appreciation" (see, inter alia, the above-mentioned Sunday Times judgment, p. 36, par. 59), the Court thus finds that the restrictions complained of were not "necessary in a democratic society", as required by paragraph 2 of Article 11 (art. 11-2)."; Associated Society of Locomotive Engineers & Firemen (Aslef) v. United Kingdom, App. No. 11002/05, § 52, 2007 Eur. Ct. H.R.: "Accordingly, in the absence of any identifiable hardship suffered by Mr Lee or any abusive and unreasonable conduct by the applicant, the Court concludes that the balance has not been properly struck and that the case falls outside any acceptable margin of appreciation."; Olha Cherednychenko, *Towards the Control of Private Acts by the European Court of Human Rights?*, 13 MAASTRICHT J. EUR. COMP. L. 195, 210 (2006): "In virtually every case in which the issue of positive obligations has arisen, the Court has reiterated that 'especially where positive

court is insensitive to the democracy dimension of private property can be seen in its judgment concerning freedom of speech in a private mall. The court granted primacy to the property right of the mall owner.[44]

3. Should the ECtHR correct all democratic deficits?

The previous part of this essay identified external pressures on domestic democracies. These are pressures to which the court should pay attention, and examine whether and how it can secure and amplify the voice of the disadvantaged individuals. In this connection, two issues arise. One is normative: whether foreigners of all types should benefit from the same protection under the convention as citizens. The second is institutional: should the ECtHR preempt the political process by imposing its own views on the proper balancing of interests and rights of non-nationals and nationals, of persons and MNCs, etc. There is much to be said on these normative questions, and I have done so elsewhere.[45] In the context of this essay, the relevant discussion is whether these two normative questions are to be left to the discretion of the member states, through the recognition by the court of a wide MoA to the democratic processes within member states, or should these questions be decided by the court, or at least mediated by it, in which case no or limited MoA is called for.

The above discussion suggests that in view of the external challenges to democracy, a MoA approach exposes not only asylum seekers but most individuals to inadequate or impoverished domestic democratic processes. The contemporary pressures on states suggest that the MoA will benefit those who can participate effectively in politics and governance while failing to reflect the preferences of others.

I wish to argue that the ECHR should be interpreted as a collective agreement to remedy also the external sources of democratic failures facing member states. In addition to the internal challenges on democracy (the relative weakness of discrete and insular minorities, or capture of the political branches by powerful lobbies), these include three types of challenges. The first type are external pressures wielded by foreign actors. These are the coercive demands by public organizations and MNCs. Having the Convention and its court on guard against such challenges does not entail any cost for the member states; on the contrary: a collective position that a central actor such as the

obligations ... are concerned ... the requirements [on the state] will vary considerably from case to case ...' and that 'this is an area in which the Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention ...'. The wide margin of appreciation has also been stressed by the ECtHR in the context of those cases in which the imposition of the positive obligations on the State had given rise to the need to strike a balance between the competing private interests."

[44] Appleby & Others v. United Kingdom, App. No. 44306/98, 2003 Eur. Ct. H.R.

[45] *See* Benvenisti, Sovereigns as Trustees of Humanity, *supra* note 23; Benvenisti & Downs, *supra* note 2, Chapter 7.

court can impose can resolve the collective action problem and be beneficial to the majority of voters in all member states.

The second type of pressure involves those that member states impose on each other, such as spillover effects from one member state to another, or "race to the bottom" policies that are aimed, for example, at making life miserable for asylum seekers so that they continue their journey to neighboring countries. A collective decision, for example, on increasing the opportunities for citizens of neighboring countries to voice their concerns in public hearings before policies that affect them adversely are adopted, is beneficial to all. Similarly, standards for minimal treatment of asylum seekers that encompass conditions for family unification and socio-economic rights could offset state policies that attempt to burden their neighbors with the asylum seekers that live in their midst. Having the ECtHR as a guardian against shirking can, also here, be beneficial to most voters.

The third type of challenge is the one that each of the member states pose to communities and individuals who are outside the Council of Europe, for example by creating "brain drain" in foreign countries, or by causing environmental damage (beyond the obvious exercise of police or military power, where no margin is recognized). Arguably, this type of challenge can hardly be reconciled with the rather basic goals of the ECHR that were stated by the outset, but these goals evolve and there are, in my view, solid normative reasons to adopt them as a collective goal of the members of the ECHR that requires common positions.

4. From MoA to Subsidiarity

Protocol No. 15[46] introduces the principle of subsidiarity into the ECHR legal system. Compared with the nebulous MoA, the principle of subsidiarity provides a rationale for deference. As articulated by the Treaty on the European Union (Article 5(3)) "[u]nder the principle of subsidiarity… the Union shall act only if and in so far as the objectives or the proposed action cannot be sufficiently achieved by the Member States, either at central level or at the regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level."

This rationale addresses directly the democratic challenges this essay addressed. It is sensitive to the sphere where public decisions should be taken. The concept of subsidiarity therefore, complex and difficult to apply as it is,[47] provides a clearer approach for thinking about how to protect individuals whose rights and opportunities are shaped by public decisions in foreign venues. The ECtHR is in a position to enhance the functioning of the domestic political and legal infrastructure

[46] Convention for the Protection of Human Rights (Protocol No. 15), 24.VI.2013.
[47] *See* Paul Craig, *Subsidiarity, a Political and Legal Analysis*, Oxford Legal Studies Research Paper No. 15/2012. http://ssrn.com/abstract=2028332.

that protects individual rights. By eschewing its deferential approach to collective challenges and adopting a more rigorous one, it will not only fulfil its mission, but also potentially reduce its caseload because the domestic units would operate more resolutely to prevent harm to the voiceless. Therefore, Protocol 15 should take over much of the space covered thus far by the MoA doctrine.

The recent jurisprudence of the court suggests that the court has indeed seized the new rationale for qualified deference to the political process by examining closely the quality of the parliamentary process that has led to the policy in question. As Robert Spano, a judge at the ECtHR pointed out, Protocol 15 and the Brighton Declaration "have ... created an important incentive for the Court in recent years to develop a more robust and coherent concept of subsidiarity."[48] In light of this concept the court deferred to what it identified as an "extensive examination by [the UK] Parliament, … the cross-party support for the Act as well as the in-depth analysis of the compatibility of the Act with the Convention, conducted by the domestic courts."[49] This "qualitative, democracy-enhancing approach," allows the court to seize the principle of subsidiarity to properly address the internal democratic deficits that may arise in the member states. [50] What remains to be seen is to what extent the same subsidiarity approach will be used by the court to protect the interests of those outsiders to the democratic system, thereby correcting the external failures of the domestic democratic processes that this essay sought to clarify.

5. Conclusion

As Sabino Cassese has written, "[t]he process of globalization of human rights has witnessed, and will continue to witness, tensions between national governments and supranational bodies. However, [the EctHR] cannot reduce its efforts to set global brakes to, and controls over, national democracies. Over time, these display ever more faults and "lacunae," as they are instruments that are far from perfect."[51]

The MoA doctrine remains a useful doctrine for the court to manage its judicial authority, [52] like other "avoidance doctrines" such as non-justiciability or the political question doctrine. It has the

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[48] Robert Spano, *Universality or Diversity of Human Rights?: Strasbourg in the Age of Subsidiarity*, 14 HUMAN RIGHTS LAW REVIEW, 487, 491 (2014).
[49] *Id.*, at 498.
[50] *See also* Matthew Saul, *The European Court of Human Rights' Margin of Appreciation and the Processes of National Parliaments*, 15 HUMAN RIGHTS LAW REVIEW 745 (2015).
[51] Sabino Cassese, *Ruling Indirectly: Judicial Subsidiarity in the ECHR*, Paper for the Seminar on "Subsidiarity: a double sided coin?, 30 January 2015, Strasbourg.
[52] Shai Dothan, *In Defence of Expansive Interpretation in the European Court of Human Rights*, 3 CAMBRIDGE J. INT'L COMP. L. 508, 515 (2014): "As these interpretive choices demonstrate, the ECHR has clearly favored expansive interpretation over restrictive interpretation. Yet there are limits to the willingness of the ECHR to expand the obligations of the states. The ECHR is limited by the text of the Convention—it can interpret the text but it cannot revise the text or bend it to reach any result it wishes. Furthermore, the object of the Convention is not to protect every

qualities of the accordion, and thus can be contracted or released ad-hoc to fit almost any set of factors. As Julian Arato notes, "It allows the Court to ensure that the Convention remains responsive to material changes in the legal, political, and social circumstances of greater Europe and beyond."[53] In the context of outsiders to the democratic process, it could also be judicially useful. Ultimately, many of these questions, particularly those related to asylum seekers, are highly divisive, and popular backlash against over-demanding judgments can be expected. As Joseph Weiler has written with respect to the ECJ's treatment of non-EC nationals, "[t]his area is a political mine field in which Governmental reaction to 'judicial meddling' may be particularly harsh… As part of the phenomenology of judging, this is an area which may have appeared to be not sufficiently important to 'spend judicial capital', measured in the coin of credibility and legitimacy, which is involved each time a court breaks with the past and makes a new development."[54]

The MoA doctrine could serve as a lubricant on the wheels of change, insisting less when tensions are particularly high. But for that to occur, the doctrine must be acknowledged as having this modest role, a signal that there are limits to enforcing the rule of law, rather than being celebrated as the epitome of democracy.

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right, and protecting rights is not its only purpose. The ECHR also considers the interests of states and defers to some of their decisions by granting them a so called "margin of appreciation". Moreover, the ECHR often invokes the "principle of proportionality". According to this principle states are allowed to infringe rights enshrined in the Convention if other legitimate interests of proportionate weight necessitate this infringement, and if this infringement doesn't impair the essence of the protected right."

[53] Julian Arato, *The Margin of Appreciation in International Investment Law*, VIRGINIA J. INT'L L. 545, 565-70 (2014): "the Court gives states a wider or narrower space of deference depending on the Convention provision in question – taking into consideration the context and importance of the interests at issue… Moreover, the margin varies over time. The Court augments the size of the member states' margin of appreciation under certain conditions… the Court has proven willing to revisit the scope of the margin in view of the convalescence of external rules of international law relating to the particular issue — a respect the Court has extended not only to other rules of international law binding on the parties to the Convention, but also to norms binding on only some of them, unratified treaties, treaties signed by only some of the parties, and even intrinsically nonbinding "soft law" instruments."

[54] Joseph H.H. Weiler, *Thou Shalt Not Oppress a Stranger: On the Judicial Protection of the Human Rights of Non-EC Nationals - A Critique*, 3 EUR. J. INT'L L. 65, 70 (1992).